

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 TEXTRON INNOVATIONS, INC.,)
5 PLAINTIFF,) CIVIL ACTION NO.
6)
7 VS.) MARSHALL, TEXAS
8 SZ DJI TECHNOLOGY CO., LTD.,)
9 DJI EUROPE B.V., SZ DJI)
10 BAIWANG TECHNOLOGY CO. LTD.,) JULY 24, 2023
11 AND IFLIGHT TECHNOLOGY) 1:32 P.M.
12 COMPANY LTD.,)
13 DEFENDANTS.)

14 MOTION HEARING

BEFORE THE HONORABLE ROY S. PAYNE

16 | UNITED STATES MAGISTRATE JUDGE

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01:32:06 1 COURT SECURITY OFFICER: All rise.

01:32:08 2 THE COURT: Good afternoon. Please be seated.

01:32:24 3 For the record, we're here for the motion hearing

01:32:30 4 in SZ DJI -- let me see, I'm sorry, Textron Innovations

01:32:40 5 versus SZ DJI Technology, which is Case No. 2:22-351 on our

01:32:46 6 docket.

01:32:47 7 Would counsel state their appearances for the

01:32:48 8 record?

01:32:49 9 MR. UNDERWOOD: Good afternoon, Your Honor.

01:32:53 10 Travis Underwood on behalf of the Plaintiff, Textron

01:32:56 11 Innovations. I'm joined by our lead counsel, Mr. Kevin

01:32:59 12 Meek, and I'm also joined by Mr. Harrison Rich. Mr. Rich

01:33:02 13 will be presenting argument on our behalf this afternoon.

01:33:06 14 And we're ready to proceed.

01:33:06 15 THE COURT: All right. Thank you, Mr. Underwood.

01:33:15 16 MR. TINDEL: Good afternoon, Your Honor. Andy

01:33:22 17 Tindel. I'm here with our lead counsel, Catherine

01:33:26 18 Nyarady --

01:33:26 19 MS. NYARADY: Good afternoon, Your Honor.

01:33:28 20 MR. TINDEL: -- and Kripa Raman.

01:33:30 21 MR. RAMAN: Good afternoon.

01:33:31 22 MR. TINDEL: They're from the Paul Weiss firm.

01:33:34 23 And we're here on behalf of all the DJI-related Defendants.

01:33:37 24 And we're ready to proceed.

01:33:39 25 THE COURT: Thank you, Mr. Tindel.

01:33:40 1 All right. Since we're here on the Defendants'
01:33:43 2 motion for protective order, I'll hear first from counsel
01:33:46 3 for Defendant.

01:33:51 4 MS. NYARADY: Thank you, Your Honor.

01:33:52 5 So we're here today on a motion under Rule 26(c)
01:33:59 6 seeking a protective order against the production of a
01:34:02 7 limited amount of source code in this case. There's no
01:34:06 8 dispute on some of the facts in question, the code resides
01:34:11 9 in China. The code in question, the restricted code as
01:34:15 10 we'll call it, is subject to export controls. It's a
01:34:19 11 restricted technology under Chinese law. And the Chinese
01:34:24 12 law calls for criminal and civil penalties should the
01:34:28 13 Defendants export that restricted code.

01:34:30 14 THE COURT: How was it decided that a certain
01:34:33 15 portion of the code is subject to that restriction?

01:34:36 16 MS. NYARADY: So there was an application --
01:34:39 17 there's actually more than one application now that were
01:34:42 18 filed with the government in China to export the code, and
01:34:47 19 as part of that process -- and this is set forth in the
01:34:50 20 Ren declaration that we submitted with our opening brief.
01:34:54 21 As part of that process, there is a committee that our
01:34:58 22 technical advisors, as I understand it, which is Phase 1 of
01:35:02 23 the process, where they determine whether or not the code
01:35:05 24 falls within the statute sections.

01:35:07 25 THE COURT: And the Plaintiff maintains in their

01:35:09 1 brief that DJI did not advise the Chinese authorities about
01:35:22 2 the protections that are provided by the Court's standard
01:35:24 3 protective order.

01:35:26 4 What do you say to that?

01:35:27 5 MS. NYARADY: That is not accurate, Your Honor.

01:35:28 6 The protective order -- well, let me -- let me split it up
01:35:33 7 because I don't want to misstate.

01:35:34 8 In the first application that was filed back in
01:35:37 9 2022, it's my understanding that the protective order in
01:35:44 10 the Western District case, that was Case I, and there was
01:35:48 11 no protective order in this case, but my understanding is
01:35:52 12 that no protective order was submitted with the first
01:35:53 13 application.

01:35:54 14 With the second application and in response to a
01:35:57 15 number of criticisms that Textron levied against DJI with
01:36:01 16 respect to the first application, in the second
01:36:03 17 application, the protective order was specifically called
01:36:06 18 out, and then the final version of that order was submitted
01:36:11 19 to the authorities in China prior to the decision denying
01:36:15 20 the export.

01:36:21 21 THE COURT: And there are a couple of other
01:36:23 22 criticisms that Textron makes, such as saying that Textron
01:36:29 23 was in the defense industry and that it would be the
01:36:33 24 importer of the source code?

01:36:37 25 MS. NYARADY: Correct. Which, again, those were

01:36:40 1 criticisms made against the first application. They were
01:36:46 2 remedied in the second application. We specifically
01:36:52 3 clarified -- and suppose we, it's DJI who filed the
01:36:54 4 application specifically clarified who was doing the
01:36:57 5 importing.

01:36:58 6 Again, we told them about the protective order.
01:36:59 7 That was another criticism that Textron had made. We made
01:37:03 8 it clear who would be receiving the code. There was a
01:37:06 9 criticism from Textron on the first application that we did
01:37:10 10 not make it clear that no -- who was going to be receiving
01:37:14 11 it, and the application could have been read, as I take
01:37:17 12 Textron's brief, to say that some individuals inside of
01:37:21 13 Textron would receive the information.

01:37:24 14 So, again, that was clarified, and then the
01:37:27 15 protective order was submitted that makes it clear who has
01:37:29 16 access to the source code.

01:37:32 17 There was also another criticism that was made
01:37:35 18 that we made the source code sound too important in the
01:37:38 19 first application. So in the second application, we
01:37:42 20 removed a lot of the language about the source code and the
01:37:45 21 relevance. Of course, now, we're being criticized for
01:37:49 22 having removed that language, but that was in response to a
01:37:52 23 criticism from Textron.

01:37:53 24 Now, I think, Your Honor, a lot of these
01:37:55 25 criticisms come up in the briefing in the analysis of good

01:37:58 1 faith. And I think it's important to understand not only
01:38:02 2 did we file two applications to date already, but in the
01:38:07 3 second application, we attempted to address all of the
01:38:09 4 criticisms that were made by Textron.

01:38:11 5 We asked the Plaintiff -- we asked Textron to be
01:38:15 6 involved with that second application. We offered to work
01:38:18 7 jointly with Textron to be -- to file an application if
01:38:23 8 they had ideas that they thought would help make the code
01:38:28 9 be produced.

01:38:29 10 They've stated during the meet and confer that
01:38:30 11 they have Chinese counsel that they've consulted with, and
01:38:33 12 so we would welcome any thoughts that they have. They
01:38:35 13 refused. They wanted nothing to do with this application
01:38:38 14 process because it's easier for them to criticize whatever
01:38:42 15 we do than to help us actually try to produce the code.

01:38:45 16 And let me be clear, DJI wants to produce this
01:38:47 17 code. We are willing to file another application. We're
01:38:52 18 willing to work with Textron on that application if there
01:38:55 19 are further things that they think we can change that would
01:38:59 20 increase the odds of it being allowed for export.

01:39:02 21 We also -- once Textron didn't want to jointly
01:39:06 22 draft anything, we drafted an application. On the meet and
01:39:11 23 confer that we had almost immediately after my firm entered
01:39:14 24 the case, Your Honor, I was on a call where we offered to
01:39:17 25 show them the application so they could comment on it.

01:39:19 1 They wanted -- they expressed that they wanted nothing to
01:39:23 2 do with the application process.

01:39:27 3 What's really bubbling to the surface, Your Honor,
01:39:29 4 is that they actually don't want the source code. What
01:39:31 5 they want is an adverse inference. What they want is for
01:39:36 6 DJI not to be able to produce the source code, they can get
01:39:39 7 an adverse inference, and they can avoid having to make
01:39:42 8 proofs in the case.

01:39:44 9 THE COURT: They contend in brief that DJI had an
01:39:49 10 opportunity to appeal after the initial rejection and did
01:39:54 11 not do so. Is that correct?

01:39:56 12 MS. NYARADY: That is my understanding. My
01:39:59 13 understanding from counsel in China is that no one has ever
01:40:04 14 appealed one of these orders in China, and the standard of
01:40:07 15 review is so high when it comes to national security
01:40:11 16 that -- that was not done.

01:40:14 17 We are willing to do that. We are still within
01:40:17 18 the window to do that on the second application. We're not
01:40:22 19 sure that that makes the most sense versus perhaps filing
01:40:25 20 another application if we can, again, amend what we're
01:40:30 21 asking for. But we're willing to file an appeal on the
01:40:34 22 second application. Again, DJI wants to produce this
01:40:38 23 source code. So we will take every step that we can to do
01:40:41 24 so.

01:40:41 25 THE COURT: One of the things that the Plaintiff

01:40:44 1 represents in brief is that this regulation has been in
01:40:49 2 place since at least 2008 and has been in its current form
01:40:56 3 since at least 2020.

01:40:59 4 Why am I not seeing other Chinese Defendants
01:41:03 5 raising this same issue?

01:41:05 6 MS. NYARADY: I don't know whether other Chinese
01:41:09 7 Defendants have source code and the types of products that
01:41:12 8 are at issue would rise to the level of national security,
01:41:15 9 Your Honor.

01:41:15 10 You know, this is flight control data. It can be
01:41:18 11 used for military purposes. I'm guessing. I don't know
01:41:22 12 the answer to that.

01:41:23 13 I also don't know -- you know, it was pointed out
01:41:27 14 in the briefing that there's been no indication or -- that
01:41:33 15 China has thrown people in jail, you know, for violating
01:41:36 16 these denial of export licenses. I'm also not aware of any
01:41:42 17 company that has taken the brazen step of ignoring such an
01:41:45 18 order and producing source code in U.S. litigation.

01:41:49 19 And it seems to DJI that producing the source code
01:41:51 20 against two now directives when the Chinese government to
01:41:56 21 see if someone gets thrown in jail, you know, does not seem
01:42:00 22 like the right approach here.

01:42:01 23 THE COURT: You know, if your motion is granted,
01:42:03 24 that basically just means you can stop trying.

01:42:07 25 Why should the Court grant that?

01:42:09 1 MS. NYARADY: We are happy to keep trying, Your
01:42:12 2 Honor. I mean, that could be part of the order. We are
01:42:15 3 happy to keep taking steps, again, to submit another
01:42:18 4 application or to appeal this.

01:42:20 5 But we wanted to get in front of this Court to
01:42:25 6 make the Court aware of the issue, to make the Court aware
01:42:27 7 of the Defendants' efforts in this regard so that we don't
01:42:32 8 end up where -- you know, quite frankly where Plaintiffs
01:42:36 9 want to end up, which is a Rule 37 motion at some point
01:42:41 10 alleging that there should be an adverse inference because
01:42:44 11 of the failure to produce the source code.

01:42:46 12 But let me be clear, I do not see a protective
01:42:49 13 order issuance as permission to stop. And, in fact, when
01:42:54 14 we briefed this motion, you know, we said unless or until
01:42:57 15 permission is granted by the Chinese government.

01:43:01 16 So I will represent to the Court that we will
01:43:04 17 have -- DJI will keep trying to produce this source code.
01:43:06 18 We're happy to submit evidence of that to the Court on an
01:43:09 19 ongoing basis and update the Court periodically.

01:43:12 20 But the situation we find ourselves in right now
01:43:15 21 is that the deadline for producing source code came, and we
01:43:21 22 knew that there was a certain amount of source code that we
01:43:24 23 legally could not produce. And that is why we came to the
01:43:28 24 Court.

01:43:29 25 THE COURT: You make the representation in your

01:43:32 1 briefs that it's an insubstantial amount of source code.
01:43:37 2 But what I see from the Plaintiffs is that the source code
01:43:41 3 modules that have been withheld appear, at least by title,
01:43:48 4 to go to the heart of their patents.

01:43:58 5 MS. NYARADY: Your Honor, the briefing by Textron
01:44:00 6 really addresses relevance. It doesn't address necessity
01:44:03 7 or need.

01:44:04 8 And the question that I keep coming back to is
01:44:08 9 what part of their infringement case can only be shown by
01:44:12 10 the source code to the point where, you know, they can't
01:44:15 11 make their case without it? I don't think there is any
01:44:19 12 such claim element that can't be shown by the source code,
01:44:23 13 and they've identified none.

01:44:24 14 And, in fact, Your Honor, as Your Honor knows,
01:44:26 15 there's a discovery order in this case that controls that
01:44:31 16 says that if a party is claiming patent infringement, if
01:44:34 17 they assert that a claim element is a software limitation,
01:44:39 18 that they don't need to comply with the 3-1 patent rule.
01:44:43 19 They can claim that it's a software limitation. They can
01:44:46 20 wait until 30 days after the source code production and
01:44:48 21 then supplement those particular elements, infringement
01:44:52 22 with respect to those particular elements.

01:44:54 23 Now, the Plaintiffs for the two patents -- and,
01:44:56 24 again, it's only two patents of the four that Textron is
01:44:59 25 claiming the source code is relevant to, the restricted

01:45:01 1 source code, and for those two patents, they have asserted
01:45:06 2 40 claims. Each have, you know, about five subparts. So
01:45:10 3 we're talking about 200 elements. For none of those
01:45:17 4 elements has Textron identified them being software
01:45:20 5 limitations, zero.

01:45:21 6 They did full claim charts. They relied on things
01:45:26 7 like manuals, on app documentation, documentation
01:45:30 8 concerning programming. They relied on videos and
01:45:35 9 screenshots of how the drones fly. And that is our
01:45:40 10 contention, Your Honor, that the patent claims can be
01:45:43 11 evaluated for purposes of infringement off of those other
01:45:48 12 documents and things that exist that have been produced in
01:45:52 13 response also to the 3-4(a) production, so schematics and
01:45:57 14 drawings and release notes and all of the source code that
01:46:00 15 can be produced.

01:46:01 16 But there is a lot of other information out there,
01:46:05 17 and we do not think that this source code is necessary for
01:46:09 18 the Plaintiffs to prove their case.

01:46:14 19 THE COURT: Of course, you don't think they can
01:46:16 20 prove their case, right?

01:46:17 21 MS. NYARADY: Well, they can try off of what they
01:46:19 22 have.

01:46:20 23 But, you know, Your Honor, to put it another way,
01:46:24 24 the patent in question has to do with how the drone moves
01:46:26 25 and how it flies. What better evidence than how the drone

01:46:31 1 flies?

01:46:31 2 Going back to the source code is not the root of
01:46:34 3 all proof. It's just not. And they have manuals that talk
01:46:38 4 about what you can do with the drone, how you can fly it,
01:46:41 5 what directions it can go in, you know, things that it can
01:46:44 6 do. And, of course, there'll be more discovery. There'll
01:46:48 7 be depositions. There'll be other things.

01:46:50 8 But they found it sufficient for their
01:46:52 9 infringement contentions to rely on, for example, videos of
01:46:55 10 how the drones fly. I think that's very telling, Your
01:47:00 11 Honor.

01:47:00 12 THE COURT: Well, I mean, obviously you know they
01:47:03 13 can't patent any drone that moves in a certain way. They
01:47:09 14 can only patent whatever their invention was that caused it
01:47:15 15 to move in a certain way.

01:47:18 16 So I can understand the problem with trying to
01:47:24 17 prove infringement to the standard of proof without being
01:47:29 18 able to examine why the accused device does what it does,
01:47:37 19 but --

01:47:37 20 MS. NYARADY: And Your --

01:47:39 21 THE COURT: -- I will -- I'll ask them to respond
01:47:41 22 to that and to show me.

01:47:49 23 MS. NYARADY: Your Honor, there was also a mention
01:47:52 24 in the briefing -- I just want to make sure we're being
01:47:56 25 clear on this -- of using the withheld code as a sword in

01:48:01 1 our non-infringement defense. They said that twice. They
01:48:04 2 then separately in the briefing regarding the underlying
01:48:10 3 protective order for this case, they said that we're going
01:48:12 4 to use it as a shield. So they've claimed that we're going
01:48:15 5 to use it as a sword and a shield.

01:48:17 6 I don't know what that means. They seem to be
01:48:20 7 implying that that happened in the prior case. I just want
01:48:22 8 to make it clear for the Court, I don't understand how a
01:48:28 9 lack of source code can be used in that way, but we do not
01:48:31 10 intend to do anything improper to rely on source code that
01:48:36 11 we could not produce or make any inferences about, you
01:48:42 12 know, why the source code is in the case, obviously, if we
01:48:47 13 were not able to produce it.

01:48:49 14 So I don't know what that involves, but I wanted
01:48:51 15 to make sure that I say that clearly.

01:48:54 16 THE COURT: What is the status of the Western
01:48:56 17 District case?

01:48:57 18 MS. NYARADY: My understanding is that they are in
01:49:00 19 post-trial briefing at the moment.

01:49:04 20 THE COURT: And what was the verdict?

01:49:05 21 MS. NYARADY: I was not in that case, Your Honor,
01:49:10 22 but my understanding is that there was infringement of two
01:49:14 23 patents, and the patents were not found invalid. Beyond
01:49:17 24 that, I don't -- obviously there was a damages award, and I
01:49:22 25 believe there was a willfulness finding.

01:49:25 1 But counsel for Textron was in both cases, so they
01:49:28 2 can correct me if I'm wrong on that.

01:49:30 3 THE COURT: And the patents are different patents
01:49:32 4 than those asserted here?

01:49:33 5 MS. NYARADY: Correct.

01:49:35 6 THE COURT: Okay. All right.

01:49:45 7 MS. NYARADY: The last thing I'll say, Your Honor,
01:49:46 8 is there was some discussion in the briefing about what the
01:49:50 9 proper standard is here or what factors should be
01:49:55 10 evaluated.

01:49:55 11 We do not believe that the seven-factor test set
01:50:01 12 forth in Defendant -- or, sorry, Plaintiff's responsive
01:50:05 13 papers is applicable here. Those are discretionary
01:50:11 14 factors. The Supreme Court specifically said they weren't
01:50:14 15 laying out a test that must be followed. And in cases in
01:50:17 16 this district and in the Fifth Circuit seem to not have
01:50:22 17 analyzed those factors. Some other district -- some other
01:50:26 18 circuit courts have.

01:50:27 19 And so we did address that in a footnote. But to
01:50:30 20 be clear, we don't think that's the right standard. That
01:50:33 21 seems to be implied when there is -- there are two choices
01:50:35 22 of ways to proceed with discovery.

01:50:39 23 That's not the case here. This is a simple
01:50:42 24 protective order motion related to the harm that would be
01:50:44 25 imposed on the Defendants for complying with U.S.

01:50:49 1 discovery.

01:50:50 2 But should the Court disagree and think that that
01:50:54 3 is the proper test, we still think that a protective order
01:50:58 4 should be granted here. Again, we don't think that the
01:51:02 5 importance of the information requested rises to the level
01:51:06 6 of being necessary, and we don't think that showing has
01:51:13 7 been made.

01:51:13 8 The degree of specificity obviously we would -- we
01:51:16 9 understand that the spec -- the requests are specific. The
01:51:21 10 origination, whether it was in the U.S., there's no dispute
01:51:24 11 here that this originated -- this material -- these
01:51:28 12 materials originated in China and have only been in China.

01:51:32 13 The availability of alternate means to get at the
01:51:37 14 discovery, as we said, there's schematics, there's drones,
01:51:40 15 there's manuals, and we continue to work with the
01:51:45 16 Plaintiffs on producing additional documents as requested.
01:51:49 17 You know, they've raised some issues that they want to see
01:51:52 18 different types of documents, and we're actively collecting
01:51:54 19 those and producing those. So we are trying our very best
01:51:58 20 to make sure that there are available alternative means for
01:52:02 21 this discovery.

01:52:03 22 There's then a balancing of the interests, and,
01:52:07 23 obviously, China has said that this source code raises
01:52:10 24 national security issues. And we don't dispute Plaintiff's
01:52:15 25 briefing that obviously there are IP concerns that are

01:52:19 1 relevant in the U.S.'s interests and the interests in
01:52:23 2 discovery -- in litigation.

01:52:26 3 On hardships, DJI obviously would face severe
01:52:30 4 criminal and/or civil sanctions should they produce this
01:52:35 5 source code without permission. We think that favors --
01:52:38 6 that factor is very important and favors DJI.

01:52:42 7 And then the good faith of DJI, again, as I said,
01:52:47 8 DJI has tried repeatedly to get the source code released,
01:52:51 9 is willing to continue to try, is willing to work with the
01:52:54 10 Plaintiffs to try to release that source code. And if and
01:53:00 11 when they get permission, they absolutely will produce it.

01:53:05 12 THE COURT: All right.

01:53:06 13 MS. NYARADY: Thank you, Your Honor.

01:53:07 14 THE COURT: Thank you, Ms. Nyarady.

01:53:09 15 MR. RICH: Good afternoon, Your Honor. Harrison
01:53:19 16 Rich from Baker Botts on behalf of Plaintiff, Textron.

01:53:21 17 Your Honor, Textron respectfully requests that the
01:53:25 18 Court deny DJI's motion. DJI's strategy with this motion
01:53:29 19 is apparent. It's using Chinese export control laws to get
01:53:34 20 a free pass on producing admittedly relevant source code.
01:53:38 21 And then DJI will use that lack of relevant source code as
01:53:42 22 a weapon to argue non-infringement.

01:53:44 23 THE COURT: Mr. Rich --

01:53:46 24 MR. MEEK: Yes.

01:53:46 25 THE COURT: -- can you show me a claim element --

01:53:50 1 one of the asserted claims where it would be logical to
01:53:54 2 look to the source code?

01:54:05 3 MR. RICH: Yes, Your Honor. This is U.S. Patent
01:54:08 4 8,332,002 (sic).

01:54:12 5 Can Your Honor see this okay?

01:54:12 6 THE COURT: This is '082?

01:54:14 7 MR. RICH: '082 patent.

01:54:17 8 THE COURT: Right.

01:54:18 9 MR. RICH: Okay. And before I launch into this,
01:54:20 10 I'll say that DJI made this same argument in front of
01:54:25 11 Judge Gilliland in the West Texas on another flight control
01:54:29 12 law patent, and he rejected that argument finding that --
01:54:31 13 he found it unlikely that the infringement could be proven
01:54:34 14 through looking at the drones.

01:54:35 15 And now diving into Claim 1 here of the '082
01:54:41 16 patent, we see that it recites a control system with
01:54:44 17 various architectures and initialization command logic.
01:54:50 18 The initial -- if you go down to the wherein clauses,
01:54:53 19 wherein the initialization command logic selectively
01:54:56 20 activates the lateral control architecture for controlling
01:55:00 21 lateral motion and selectively activates the longitudinal
01:55:05 22 control architecture for controlling the longitudinal
01:55:07 23 motion.

01:55:08 24 And then these -- the following wherein clause is
01:55:11 25 that the control system uses the lateral control and

01:55:14 1 longitudinal control architectures to control speed
01:55:18 2 variations while the aircraft is maintaining a constant
01:55:22 3 vector. These are software limitations. We're talking
01:55:24 4 about logic and architectures within the code. We're not
01:55:27 5 talking about how you can look at a drone and see it.

01:55:32 6 And that's what makes this case so much different
01:55:36 7 than the one from the Federal Circuit that they cited, the
01:55:37 8 Cochran case, where it was about a scuba device. We're not
01:55:41 9 talking about a scuba device. We're talking about the
01:55:44 10 control system and how the control laws within that system
01:55:46 11 are programmed and how they are working to control the
01:55:49 12 drone.

01:55:55 13 THE COURT: And you have or your side has reviewed
01:55:58 14 a lot of source code already in this case.

01:56:02 15 Are you representing that the source code that
01:56:04 16 you've reviewed is not the source code that performs these
01:56:08 17 functions in the accused device?

01:56:11 18 MR. MEEK: Your Honor, last week, the -- DJI
01:56:15 19 filed a correction to its briefing that they did not
01:56:18 20 actually produce a vast amount of source code. And so the
01:56:22 21 source code that we have reviewed is very sparse. We
01:56:25 22 submitted a declaration from our code reviewer to that
01:56:29 23 point.

01:56:30 24 And my understanding is that there is no -- or at
01:56:34 25 least very minimal flight control code that's been

01:56:37 1 produced.

01:56:45 2 THE COURT: All right. And help me understand --
01:56:47 3 and this is a point that defense counsel inquired about
01:56:51 4 too, your concern that the absence of the source code would
01:56:56 5 be used as a sword for non-infringement.

01:56:58 6 MR. RICH: Sure.

01:57:05 7 In the West Texas case, there were two main
01:57:08 8 arguments they made. The first one was we had a patent
01:57:12 9 that said you hold speed, and that's what's important to
01:57:17 10 know for this argument. The patent says hold speed.
01:57:20 11 They're arguing non-infringement based on holding position.
01:57:25 12 They say, we hold position, not speed.

01:57:27 13 And I want to show you a trial transcript where I
01:57:31 14 crossed their infringement -- non-infringement expert. And
01:57:35 15 I'm going to flip through this.

01:57:45 16 Can Your Honor see this okay?

01:57:47 17 THE COURT: Oh, yes.

01:57:48 18 MR. RICH: Okay. So what happened at trial, I'll
01:57:50 19 give you a little bit more context here, is what you'll
01:57:53 20 ultimately see in this transcript is they produced a
01:57:56 21 position control file, but they withhold velocity control.
01:58:01 22 So they're saying, we don't speed, we do position, but they
01:58:04 23 withheld the speed control file.

01:58:06 24 And so I asked their expert: When you were asked
01:58:10 25 yesterday how you knew drones are holding a position, you

01:58:14 1 pulled up a source code file, didn't you?

01:58:16 2 And he says: I did.

01:58:19 3 And you showed a function name "horizontal

01:58:24 4 position control." Do you remember that?

01:58:26 5 I do.

01:58:27 6 But you left out something important. You're

01:58:31 7 aware that one of the files that DJI withheld in this case

01:58:35 8 is called horizontal velocity control.

01:58:38 9 And he says: Okay.

01:58:39 10 And so they centered their argument around a file

01:58:39 11 that was withheld, and they centered their argument on how

01:58:44 12 the product works on the thing they produced.

01:58:50 13 And so I ultimately asked him if he thought it was

01:58:52 14 fair to be saying that DJI only holds position when they

01:58:53 15 didn't give us the velocity control file.

01:59:00 16 And ultimately, he, evades a bit here and says

01:59:03 17 that the file names don't really mean anything.

01:59:10 18 And so I think this is the tactic that they're

01:59:13 19 going to take is they're going to produce some code and

01:59:16 20 say, this is how it works, but there -- there is other

01:59:20 21 highly relevant code that they've already admitted is

01:59:22 22 relevant that will go to infringement.

01:59:25 23 And in this scenario, I don't see how they can

01:59:27 24 produce a file called position control and withhold

01:59:31 25 velocity control under the guise of Chinese export control.

01:59:39 1 THE COURT: The Defense contends that you have
01:59:43 2 turned down opportunities or requests to assist in drafting
01:59:49 3 the request to the Chinese authorities.

01:59:53 4 What is the thinking behind that?

01:59:55 5 MR. RICH: I don't have a specific recollection of
01:59:57 6 actually being asked to be involved in drafting the
02:00:00 7 application other than when we first told them to go submit
02:00:04 8 an application, counsel told us, you're the ones that
02:00:07 9 actually have to file it, and we said, that wasn't right,
02:00:09 10 and ultimately they flipped that and said that they would
02:00:12 11 go file the application.

02:00:16 12 We pointed out several deficiencies in the
02:00:19 13 application from the West Texas case and understood that
02:00:23 14 those would be resolved. However, we don't think they were
02:00:26 15 resolved.

02:00:28 16 If you looked at our briefing, they represented
02:00:30 17 that they would make the protective order a significant
02:00:33 18 component of their submission. But what did they do? They
02:00:39 19 actually did not include it until one business day before
02:00:43 20 China denied their application.

02:00:51 21 And when they submitted their reply brief, they
02:00:53 22 submitted a declaration from a DJI employee, and all it was
02:00:57 23 was about one sentence that said, we submitted the
02:00:59 24 protective order a couple days ago.

02:01:02 25 There was no indication of what they submitted

02:01:04 1 with the protective order, whether there was any
02:01:06 2 negotiations or explanation of the protective order,
02:01:09 3 nothing.

02:01:12 4 And if you look at Chinese -- the China -- China's
02:01:15 5 denial of the export application, it doesn't even reference
02:01:19 6 the protective order, so there's no indication it was ever
02:01:22 7 seriously considered.

02:01:25 8 THE COURT: Does your Chinese counsel advise you
02:01:27 9 that this is a highly unusual thing or anything else
02:01:33 10 relevant about the way these regulations are normally
02:01:38 11 handled?

02:01:39 12 MR. RICH: Your Honor, I was a little bit
02:01:44 13 surprised to hear that we have Chinese counsel. That's not
02:01:47 14 something we have.

02:01:47 15 THE COURT: All right. Tell me about their --
02:01:53 16 they offer that you could inspect the source code if you
02:02:00 17 have a Chinese national expert even if it's someone who
02:02:07 18 ordinarily resides in this country.

02:02:09 19 Is that an avenue that Textron has explored?

02:02:12 20 MR. RICH: We considered it, but, Your Honor, if
02:02:16 21 you looked at what they were saying was you could have
02:02:19 22 somebody go over there and look at the relevance of that
02:02:21 23 code and report back. In other words, check the box, see
02:02:23 24 if it's relevant, and we'll go from there.

02:02:25 25 But they had already represented that the code was

02:02:28 1 relevant in the letter that we submitted with the briefing.
02:02:34 2 So it didn't move the ball forward because that person
02:02:38 3 couldn't tell us anything about the substance of what was
02:02:40 4 in the code, and we couldn't use it in this case other than
02:02:43 5 to look at relevance.

02:02:45 6 THE COURT: I see. What remedy does Textron
02:03:01 7 intend to pursue if this protective order is not granted?

02:03:05 8 MR. RICH: Your Honor, of course, first, we need
02:03:07 9 to have the motion denied so that we can pursue a remedy
02:03:10 10 under Rule 37, and we will proceed to briefing on that.

02:03:13 11 We think the baseline ought to be what
02:03:16 12 Judge Albright did in the West Texas case where there was
02:03:20 13 an adverse inference that the withheld code would be
02:03:24 14 favorable to the infringement case on the patent that the
02:03:26 15 code was relevant to.

02:03:28 16 THE COURT: So not that a particular element would
02:03:33 17 be deemed satisfied but rather just an adverse inference?

02:03:37 18 MR. RICH: I think that would be a starting point,
02:03:39 19 Your Honor. But we do need to talk more seriously because
02:03:41 20 they tried to undermine that inference in the trial by
02:03:45 21 arguing that the code wasn't relevant, and, for example,
02:03:49 22 the line of questioning I had to do that I showed
02:03:52 23 Your Honor.

02:03:53 24 So I think we need to start from the baseline of
02:03:56 25 that type of inference and consider whether something more

02:03:59 1 is needed to guard against arguments like the code isn't
02:04:03 2 relevant, and you should disregard the inference.

02:04:16 3 THE COURT: Other than to have provided the
02:04:18 4 current protective order earlier in the process along with
02:04:22 5 the application itself, what other criticism do you have of
02:04:28 6 the application that DJI made in this case?

02:04:31 7 MR. RICH: Well, I think they did not -- and we
02:04:35 8 told them about this. The original application in our view
02:04:39 9 poisoned the well to where China was never going to reverse
02:04:42 10 course, and when I say original application, I'm talking
02:04:45 11 about the West Texas application. Once that was done, we
02:04:48 12 think it was a done deal.

02:04:51 13 And we told them that because of the
02:04:53 14 misrepresentations to China in the West Texas application
02:04:57 15 about who would get the code, they needed to go tell China
02:05:01 16 that there were misrepresentations made and that they were
02:05:04 17 now correcting the record as they did here. And they
02:05:09 18 didn't do that.

02:05:10 19 And so we think that China was -- it was very
02:05:12 20 difficult to get them to reverse course once they thought
02:05:17 21 that an American defense contractor would get possession of
02:05:23 22 the source code.

02:05:23 23 And obviously the protective order in our mind is
02:05:26 24 a big one when they said it's going to be a significant
02:05:28 25 part of the submission, and it wasn't even submitted until

02:05:31 1 the business day before. I think they could have explained
02:05:34 2 what was in the protective order and better explained how
02:05:36 3 that was going to guard against the code.

02:05:41 4 And I do want to show the Court one more thing
02:05:46 5 here because this, I think, came up on the opening argument
02:05:49 6 here. DJI actually checked the box that this technology is
02:05:56 7 not a Chinese state secret technology. I've got a couple
02:06:00 8 of stars down here, Your Honor. And so I was -- I don't
02:06:06 9 think China has an interest in guarding this as a state
02:06:10 10 secret because DJI is saying it's not, and DJI also checked
02:06:14 11 the box, whether it has military use, checked no.

02:06:19 12 And so this is a commercial -- according to this
02:06:23 13 application, a commercial product. And so I'm not seeing a
02:06:27 14 strong China interest in protecting it.

02:06:30 15 THE COURT: I see two checks in that box involving
02:06:34 16 military use.

02:06:36 17 MR. RICH: The "no" is highlighted bold, and so I
02:06:39 18 interpret that as no.

02:06:40 19 THE COURT: All right.

02:06:41 20 MR. RICH: Same with state secret, which I think
02:06:43 21 would be consistent with viewing this as a no.

02:06:48 22 THE COURT: All right.

02:06:58 23 MR. RICH: I do want to touch on -- Your Honor,
02:07:00 24 just very briefly, I want to touch on Judge Schroeder's
02:07:04 25 opinion from last week on the parties' disputed protective

02:07:07 1 order provisions. That opinion in our view effectively
02:07:12 2 decided the issue against DJI. Your Honor may recall that
02:07:15 3 DJI pursued some pretty strong source code protections
02:07:18 4 through the joint motion on a protective order. That was
02:07:21 5 Docket 41.

02:07:23 6 One of the provisions that DJI pursued was in
02:07:27 7 Paragraph 16 of their proposal. And I've highlighted the
02:07:31 8 relevant language yellow here, and I'll read that into the
02:07:34 9 record. The provision they asked for: Without license or
02:07:40 10 permission from Chinese competent government, no protected
02:07:46 11 material, which would include source code, may leave the
02:07:48 12 territorial boundaries of Chinese mainland or be made
02:07:51 13 available to any person who is not a national to PRC or
02:07:56 14 lawfully admitted for permanent residence in Chinese
02:07:59 15 mainland.

02:08:00 16 So we briefed that issue. That's exactly what
02:08:03 17 they're pursuing here. We briefed that issue, and the
02:08:06 18 Court resolved it against DJI. We briefed it again when
02:08:09 19 DJI objected to the Court's order. But last week, Judge
02:08:12 20 Schroeder found no error in the Court rejecting that
02:08:15 21 provision.

02:08:15 22 And the relief DJI is seeking here is not any
02:08:18 23 different because DJI's proposed order is that it doesn't
02:08:20 24 have to produce the code unless and until China grants a
02:08:25 25 license. And that's exactly what Paragraph 16 was trying

02:08:28 1 to do. DJI is making the same types of arguments, and the
02:08:32 2 Court already rejected them. There's no reason to depart
02:08:36 3 from the Court's prior ruling here.

02:08:44 4 Your Honor, on the argument about, well, Textron
02:08:46 5 doesn't need the code because there's other discovery, I
02:08:50 6 want to point out a couple things. First, I think it's a
02:08:53 7 logical sleight-of-hand. If DJI can't produce the code
02:08:57 8 because they say it's restricted, then they also have
02:09:00 9 documents that if they explain how the code works, those
02:09:03 10 aren't getting out.

02:09:07 11 It's also to me a very hollow argument. We
02:09:09 12 pointed out in the briefing that they haven't identified a
02:09:13 13 single document in the briefing that would show how the
02:09:15 14 product works other than the code.

02:09:18 15 Of course, they said they produced the vast amount
02:09:24 16 of code, and we showed that that was inaccurate.

02:09:27 17 And then this argument about necessity. Necessity
02:09:30 18 is not the standard. The Aerospatiale standard is the
02:09:35 19 standard, and that's the importance of the withheld
02:09:37 20 material. Their own cases -- and, in fact, they were the
02:09:39 21 ones that first cited that standard in their opening brief
02:09:42 22 in a footnote. And their own cases actually go through the
02:09:48 23 Aerospatiale factors.

02:09:51 24 DJI argued that it faces criminal penalties if it
02:09:54 25 produced the code. Again, DJI argued that on this

02:10:01 1 Paragraph 16 protective order dispute. And Judge Schroeder
02:10:03 2 and this Court did not find it persuasive.

02:10:06 3 We cited, Your Honor, the In re Valsartan case,
02:10:11 4 and I think that logical applies very strongly here. PRC
02:10:14 5 Defendants cannot enter the U.S. market expecting a shield
02:10:15 6 from unfavorable discovery by blocking statutes. If you
02:10:19 7 don't like the rules, that Court said, then stop doing
02:10:23 8 business here.

02:10:24 9 DJI is the world's largest drone maker and does
02:10:28 10 billions in business here. They chose to do business here,
02:10:30 11 and they should play by the rules.

02:10:32 12 There's actually no cited evidence from DJI that
02:10:36 13 this law is even enforced against company like DJI. DJI is
02:10:43 14 a Chinese behemoth, and our government has identified them
02:10:48 15 as a Chinese military company, so it makes little sense to
02:10:53 16 enforce a law that they're citing against a company like
02:10:56 17 that.

02:10:56 18 DJI in their argument said that it's a limited
02:11:00 19 amount of code, but, again, it's the flight control code.
02:11:03 20 Our expert in the declaration tied all the withheld modules
02:11:09 21 to the claims. It's highly important information.

02:11:12 22 THE COURT: All right.

02:11:14 23 MR. RICH: Thank you, Your Honor.

02:11:14 24 THE COURT: Thank you, Mr. Rich.

02:11:27 25 MS. NYARADY: So, Your Honor, during the meet and

02:11:29 1 confer that we had on May 23rd, Textron's counsel did say
02:11:33 2 that they consulted with individuals in China, and it may
02:11:37 3 be that I assumed they were attorneys. So I apologize if
02:11:40 4 that's not accurate.

02:11:40 5 But they represented that they had been looking
02:11:43 6 into these issues, you know, in parallel.

02:11:47 7 With respect to the vast amount of source code,
02:11:54 8 which counsel has said that we admitted we did not produce,
02:11:59 9 I don't think that accurately reflects the declaration that
02:12:01 10 was submitted. There were, in fact, you know, well over
02:12:06 11 1.5 million lines of code. It took their expert over four
02:12:09 12 days to go through the code that was there. And to be
02:12:14 13 clear, not all of the flight control code is part of the
02:12:17 14 restricted code. It's certain modules.

02:12:21 15 And so, again, we do not believe -- and even the
02:12:26 16 parts that were put up on the screen, we don't believe that
02:12:28 17 those elements need source code to be addressed. They were
02:12:33 18 addressed in the infringement contentions without it. And
02:12:36 19 the declarations from the expert -- separate from attorney
02:12:38 20 argument, the declaration from the expert limited his
02:12:42 21 findings to relevance. We briefed the entire motion saying
02:12:45 22 that we believed the proper standard was necessity, that we
02:12:50 23 believed that there needed to be a showing that they needed
02:12:53 24 this source code.

02:12:56 25 And this, Your Honor, comes from cases within this

02:12:59 1 circuit. The MI case in the Southern District did not use
02:13:03 2 the seven-factor case. The Cunningham case from the
02:13:06 3 Eastern District of Texas did not. The Arigna case from
02:13:12 4 the Eastern District did not address these factors.

02:13:15 5 So we stand by the fact that we think the proper
02:13:18 6 test for a protective order is whether it has been shown
02:13:22 7 that it will be oppressive and an undue burden to produce,
02:13:27 8 and then the burden shifts to Textron to show that it's
02:13:30 9 necessary and that any harm is outweighed by the need for
02:13:35 10 the discovery.

02:13:37 11 And so when he points to things like, you know,
02:13:41 12 position control and velocity control, again, I come back
02:13:44 13 to those are things that are readily observable, and
02:13:48 14 there's been no showing that figuring out exactly how that
02:13:52 15 works is necessary, and certainly none by the expert.

02:13:55 16 THE COURT: When the claim element is control
02:14:02 17 logic, how can that be anything but code?

02:14:05 18 MS. NYARADY: Well, if you have architecture
02:14:07 19 documents and documents that describe schematics that talk
02:14:11 20 about how the system works and how the pieces talk to each
02:14:13 21 other, that could be described in words. That could be
02:14:16 22 described in documents.

02:14:17 23 THE COURT: And has that been done? Have they
02:14:20 24 been given architecture that it describes in words
02:14:23 25 everything that's in the code?

02:14:24 1 MS. NYARADY: We believe that they were given
02:14:27 2 documents sufficient to show the operations. There is --
02:14:30 3 there have been meet and confers on this. They have --
02:14:35 4 Baker Botts and Textron has disputed that we have produced
02:14:38 5 enough in terms of the 3-4(a) production with respect to
02:14:43 6 schematics and other documents, and they've identified
02:14:45 7 certain documents that they wanted us to go back and look
02:14:48 8 for, and we've been doing that, and we've been producing
02:14:51 9 more documents on a rolling basis, and if they raise other
02:14:54 10 issues, we will keep looking for the right documents and
02:14:59 11 what they need.

02:15:00 12 THE COURT: All right.

02:15:00 13 MS. NYARADY: But we do not believe that the only
02:15:03 14 way at this is the source code.

02:15:05 15 THE COURT: Well, at this point, I'm not satisfied
02:15:09 16 that DJI has used its best efforts to get the regulatory
02:15:19 17 approval. There -- the Plaintiff points out that there
02:15:25 18 were errors in the first application made in the Western
02:15:27 19 District that have not been squarely confronted. There was
02:15:31 20 also the fact that the application here omitted the
02:15:37 21 protective order, which is a fairly crucial thing until the
02:15:41 22 day before the decision.

02:15:42 23 I'm going to deny the motion for protective order
02:15:48 24 at this time. But there won't be a decision made about
02:15:52 25 what remedy the Plaintiff is entitled to until we get a lot

02:15:58 1 further down the road. And before any remedy is decided
02:16:04 2 on, the Defendant will have had the opportunity to see
02:16:07 3 whether that source code can be obtained through additional
02:16:13 4 efforts, and the Plaintiff will be put to the task of
02:16:16 5 showing what the effect has been of the failure to produce
02:16:24 6 the source code, and with that information an appropriate
02:16:31 7 remedy can be crafted.

02:16:32 8 But I do not believe that at this point the
02:16:37 9 Defendant has shown entitlement to a decision that it has
02:16:43 10 done everything it can and is not in default.

02:16:51 11 So at this point, it is denied, but that does not
02:16:57 12 mean that any -- it does not dictate what the remedy will
02:17:02 13 be. I think there's a vast array, and I'll leave that for
02:17:07 14 the future.

02:17:10 15 MS. NYARADY: Thank you, Your Honor.

02:17:11 16 THE COURT: Anything else, Ms. Nyarady, that your
02:17:13 17 side needs?

02:17:14 18 MS. NYARADY: Not from me, Your Honor.

02:17:15 19 THE COURT: All right. Mr. Rich?

02:17:21 20 MR. RICH: We are having some issues on other
02:17:23 21 discovery that we'll meet and confer about, and I think we
02:17:26 22 are going to try to do one very briefly after this. So we
02:17:30 23 may be back before the Court very soon.

02:17:33 24 THE COURT: I'll be here.

02:17:33 25 MR. RICH: Thank you, Your Honor.

02:17:36 1 THE COURT: All right. Thank you.

02:17:37 2 And we'll be in recess until the next matter is
02:17:39 3 ready to resume. Thank you.

02:17:41 4 COURT SECURITY OFFICER: All rise.

02:17:43 5 (Hearing concluded at 2:17 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

9 /S/ Shelly Holmes
10 SHELLY HOLMES, CSR, TCRR
11 CERTIFIED SHORTHAND REPORTER
12 State of Texas No.: 7804
13 Expiration Date: 10/31/2023

7/26/2023
Date